STATE BOARD OF EQUALIZATION
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March 16, 2011

Re: Tax Opinion Request

Dear ---:

This is in response to your email dated December 2, 2010, in which you request information as to the application of the Sales and Use Tax Law to certain charges associated with sales of containers of automotive refrigerant. You state, in relevant part:

> We developed a regulation for small containers of automotive refrigerant sold predominantly in auto parts, hardware, and "big box" stores. This product is mainly used by do-it-yourself individuals who want to recharge the air conditioner in their motor vehicle. This regulation was adopted by our Board in January 2009 and became state law. One of the parts of the regulation is a recycling program where the consumer pays a refundable deposit when the product is purchased. The consumer receives the deposit back when he returns the used container to the retailer. The remaining refrigerant and the container materials are then recycled by the manufacturer. . . . Is BOE Regulation 1589 applicable to this situation? Would you be able to help us?

Additionally, your office provided copies of California Code of Regulations, title 17, sections (hereafter ARB Regulation) 95360-95370, which implement the container recycling program in question. Your office also provided the initial and final statements of reason for these regulations.

We understand you to be asking for an opinion on the application of the Sales and Use Tax Law to the deposit imposed by retailers pursuant to ARB Regulation 95366, subdivision (a)(1).

ARB Regulation 95360 explains that these regulations apply to any person who uses, sells, supplies, offers for sale, advertises, manufactures for sale, recycles, reclaims, recovers, imports, exports, or introduces into commerce in the State of California any automotive refrigerant in a small container that is used or intended for use to charge motor vehicle air conditioning systems.

ARB Regulation 95361 provides certain definitions relevant to the recycling program. It states, in relevant part:

> (a) The definitions in section 1900(b), Title 13 of the California Code of Regulations apply with the following additions:
>
> (5) "Consumer" means the first person who in good faith purchases automotive refrigerant in a small container for purposes other than resale, including, but not limited to, MVAC maintenance and repair activities or other applications involving this product. A person who purchases automotive refrigerant in a small container for purposes of repairing another person's MVAC for consideration (e.g., a MVAC technician) is considered a 'consumer' for purposes of this subarticle. Manufacturers, distributors, and retailers are not consumers.
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> [¶] . . . [¶]
>
> (7) "Distributor" means any person to whom an automotive refrigerant small container is sold or supplied for the purposes of resale or distribution in commerce, including imports to and exports from the United States. Manufacturers, retailers and consumers are not distributors.
>
> [¶] . . . [¶]
>
> (12) "Manufacturer" means any person who imports, manufacturers, assembles, packages, repackages, recovers, recycles, or reclaims automotive refrigerant in a small container, or who re-labels such a container of refrigerant.
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> [¶] . . . [¶]
>
> (19) "Retailer" means any person who owns, leases, operates or controls, or supervises a retail outlet in California. Manufacturers, distributors, and consumers are not retailers.

ARB Regulation 95366 describes the container deposit and return program. It states:

> (a) Except for small containers of automotive refrigerant exempted under section 95363 or section 95364 of this subarticle, on or after January 1, 2010, and subject to the provisions of section 95367, a retailer of automotive refrigerant in a small container that is subject to the requirements of this subarticle must:
>
> (1) Collect a deposit from the consumer or charge the consumer's account for each small container of automotive refrigerant at the time of sale.
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> (2) The amount of deposit on each small container is initially set at $10, and can be increased in $5 increments as described in section 95367(d)(1) or decreased in $5 decrements as described in section 95367(d)(2), but in no event shall the deposit amount of section 95366(a) be reduced below $5.

(3) Return the deposit to the consumer, or credit the consumer's account when the consumer returns a used small container of automotive refrigerant to the retailer, provided that the consumer returns the used container of refrigerant to the retailer where purchased within 90 days of purchase, submits proof of purchase (e.g., cash register receipt), and provided that the container has not been breached. A retailer may return the deposit at his discretion if more than 90 days have elapsed, the consumer does not have a receipt, if the consumer returns the container to a location other than the place of purchase, or if the container has been breached.

(4) Accumulate and store any used small container of automotive refrigerant for transfer to the manufacturer or its designee, and may segregate breached returned small containers from non-breached returned small containers. The manufacturer will, along with each participating retailer/distributor, identify or provide collection bins, totes or boxes that work in a complementary fashion within each retailer/distributors' current established distribution best practice for like merchandise, facilitating their ability to segregate breached small containers. Likewise, it will be the manufacturer's responsibility to identify each retailer/distributor's most complimentary manner of transport and return of returned small containers of automotive refrigerant to the recovery/recycle facilities.

(b) Except for small containers of automotive refrigerant exempted under section 95363 or section 95364 of this subarticle, on or after January 1, 2010, and subject to the provisions of section 95367, a manufacturer or its designated return agency must:

(1) Collect a deposit on each small container of automotive refrigerant at the time of sale to a distributor or retailer.

(2) Accept from a retailer or distributor used small containers of refrigerant certified under section 95362.

(3) Maintain a log of returned used containers by SKU, retailer, and return date.

(4) Refund to the retailer or distributor the full amount of the deposits collected under section 95366(b)(1) for all used small containers of automotive refrigerant certified under section 95362 that were returned. A manufacturer or designated return agency must count and record the number of small containers of automotive refrigerant that have been breached.

(5) All deposits not returned by manufacturers to retailers in exchange for used small containers of automotive refrigerant will accrue to an account managed by the manufacturer to be used solely as described in section 95366(b)(6) for the purpose of enhancing the consumer education program. The manufacturer must report and account for how these account funds are spent in accordance with section 95367(a)(5) of this subarticle.

(6) Separately account for any funds attributable to unclaimed deposits, expend those funds only on enhanced educational programs approved by the Executive Officer, that are designed to inform consumers of measures to reduce GHG emissions associated with do-it-yourself recharging of MVAC systems, and provide to ARB an accounting of the collection and expenditures of these funds as described in section 95367(a)(5). Examples of enhanced education programs include, but are not limited to: improved Internet website support, development of additional educational materials, training and outreach to the consumer via retailers, and development and usage of videos and other means of demonstrations at retail sites. A manufacturer must provide a description of any proposed enhanced educational programs in its application for certification of small containers of automotive refrigerant, and must obtain the Executive Officer's approval before it can expend funds attributable to unclaimed deposits on that enhanced educational program.

(c) A manufacturer may designate an additional facility to receive and store returned used small containers of automotive refrigerant and to pay consumer refunds specified in section 95366(a) and (b) at the time a container is returned. Such a facility may be either a retail store or an entity that is not affiliated with a retail store.

(d) A manufacturer or its designee must coordinate the collection of used small containers of automotive refrigerant from retailers and any designated return agencies. To reduce the burden on the retailer, the manufacturer shall, along with each participating retailer/distributor, identify or provide collection bins, totes or boxes that work in a complementary fashion within each retailer/distributors' current established distribution best practice for like merchandise. Likewise, it shall be the manufacturer's responsibility to identify each retailer/distributor's most complementary manner of transporting returned small containers of automotive refrigerant to the recovery/recycle facilities.

(e) A manufacturer or its designee must recover any refrigerant remaining in the returned small containers at a facility registered with the ARB as described in "Certification Procedures for Small Containers of Automotive Refrigerant" adopted on July 20, 2009, and last amended on January 5, 2010, which is incorporated by reference herein. The facility must employ good engineering practices to avoid loss of refrigerant to the atmosphere. The refrigerant must be recovered, recycled, reclaimed, or removed to a licensed waste disposal facility.

Any violation of the provisions of ARB Regulations 95360-95370 may result in penalties and injunctions. (ARB Reg. 95368, subds. (a),(b).) While ARB Regulation 95366, subdivision (a)(2) sets the amount of deposit at ten dollars (with potential adjustments at a future time under ARB Regulation 95367, subdivision (d)) for the deposit collected by the retailer from the consumer, no such amount is set for the deposit the manufacturer must collect from the distributor or retailer under ARB Regulation 95366, subdivision (b). According to the Final Statement of Reasons for Rulemaking, comment sixteen, the Air Resources Board received a public comment recommending that a minimum amount be set for the deposit the manufacturer must collect from the distributor or retailer. In the response to this comment, it is clear that the Air Resources Board considered the fact that the deposit may be as little as one cent; however, its

position remained that "it is more appropriate that manufacturers, who possess much more extensive knowledge and experience of the market for small containers of refrigerant than it does, to establish manufacturer-retailer deposits."

We further note that while a manufacturer is required to collect a deposit from a retailer or a distributor and a retailer must collect a separate deposit from a consumer, there does not appear to be any provision in the law that requires a distributor to collect a deposit from a retailer. The Initial Statement of Reasons states that "the proposed regulation would require a retailer to pay a deposit on each can to the manufacturer/distributor, and to collect a deposit when the small container of refrigerant is sold . . . ." A figure shows a possible flow chart of deposits collected including one from the manufacturer to the distributor, the distributor to the retailer, and the retailer to the consumer. The deposit is shown as being returned from the retailer to the consumer and then from the *manufacturer* to the retailer. However, in the regulations you provided, there is no requirement that a distributor collect a deposit from a retailer. According to the Initial Statement of Reasons, the "specific details of the deposit program are up to the manufacturers, distributors, and retailers" and the flow chart is "only an example, included for purposes of clarification."

Sales and Use Tax Law

I initially note that Revenue and Taxation Code section 6596 sets forth the circumstances under which a taxpayer may be relieved of liability for taxes when relying on a written response to a written request for advice from the Board. This opinion does not come within section 6596 because the identity of the specific person for whom the advice is requested was not disclosed in this request for written advice. (See Cal. Code Regs., tit. 18, § (Regulation or Reg.) 1705, subd. (b)(1).)

As a starting point, California imposes a sales tax measured by a retailer's gross receipts from the retail sale of tangible personal property inside this state, unless the sale is specifically exempted from taxation by statute. (Rev. & Tax. Code, §§ 6051, 6091.) The sales tax is imposed on the retailer who may collect reimbursement from its customer if the contract of sale so provides. (Civ. Code, § 1656.1; Reg. 1700.) When sales tax does not apply, use tax is imposed, measured by the sales price of property purchased from a retailer for the storage, use, or other consumption of the property in California, unless specifically exempted or excluded from taxation by statute. (Rev. & Tax. Code, §§ 6201, 6401.) The use tax is imposed on the person actually storing, using, or otherwise consuming the property. (Rev. & Tax. Code, § 6202.) Taxable gross receipts or sales price includes all amounts received with respect to the sale, with no deduction for the cost of the materials, service, or expense of the retailer passed on to the purchaser, unless there is a specific statutory exclusion. (Rev. & Tax. Code, §§ 6011, 6012.)

Regulation 1589 discusses the application of tax to the sales of containers. A "container" is an article such as a can in or on which tangible personal property is placed for shipment and delivery. (Reg. 1589, subd. (a).) A "returnable container" is a container of a kind customarily returned or resold by the buyers of the content for re-use by the packers, bottlers or sellers of the commodities contained therein. (*Ibid*.) A container, title to which is retained by the seller or for which a deposit is taken by such seller, is a returnable container. (*Ibid*.) As used in Regulation 1589, "deposit" means an amount charged to the purchaser of the contents of the container with the understanding that such amount will be repaid when the container or a similar container is

delivered to the seller. (*Ibid*.) "Deposit" does not include amounts representing redemption or recycling values of beverages pursuant to division 12.1 (commencing with Section 14500) of the Public Resources Code (CRV). Deposits are not taxable. (*Id*. at subd. (b).)

The CRV is not considered a deposit for sales and use tax purposes because the CRV amount is generally not returned by the retailer to the customer. Instead, the customer may recover the CRV payment from unrelated third parties at various recycling centers. (See Pub. Resources Code, § 14571.) A deposit must be returned to the customer by the *seller*. (Reg. 1589, subd. (a).) While certain retailers may be required to redeem CRV payments for all applicable beverages containers returned to them, these retailers must do so without regard to whether they sold the underlying beverage container. (See Pub. Resources Code, § 14571.6.) The CRV fees are part of "gross receipts" because "gross receipts" generally include all amounts received with respect to the sale of tangible personal property, with no deduction for expenses of the retailer, unless there is a specific statutory exclusion. (Rev. & Tax. Code, § 6012, subd. (a)(2).)

We conclude that the container deposit collected by retailers, as defined by ARB Regulation 95361, subdivision (a)(19), is a deposit under Regulation 1589, subdivision (a) and is not subject to tax. (Reg. 1589, subd. (b).) Unlike the CRV, in order to collect the refund on this deposit, a consumer must return the container to the location where the container was purchased. (ARB Reg. 95366, subd. (a)(3).) Furthermore, this is not simply a cost that is being passed on by the retailer to the consumer. We note that the deposit collected by the manufacturer from the retailer could be as little as .1 percent ($.01/$10.00) of the deposit collected by the retailer from the consumer. Additionally, there may be instances when a retailer acquires a container from a distributor, who is not required under the law to collect any deposit. Nonetheless, this is an amount charged to the purchaser of the contents of the container with the understanding that such amount will be repaid when the container is delivered to the seller. As such, this charge is a deposit.

I hope this answers your questions. If you have any further questions, please write again.

Sincerely,

Cary Huxsoll
Tax Counsel

CH/mcb

cc: Sacramento District Administrator (KH)